

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers)	CC Docket No. 01-338
)	

PETITION FOR STAY PENDING JUDICIAL REVIEW

Pursuant to 47 C.F.R. §§ 1.41 and 1.43, the Verizon telephone companies (“Verizon” or “petitioners”) request that the Commission preserve the status quo in the market by staying the portions of its recently released *Order on Remand*¹ that permit CLECs to convert to unbundled network elements the special access circuits that they are currently using to serve customers successfully.

For the reasons explained below, this conversions rule, which simply gives a price break to companies that are already competing successfully, is fundamentally inconsistent with the Telecommunications Act of 1996 (“1996 Act” or “Act”) and the directives of the Supreme Court and the D.C. Circuit, and will impede, rather than promote, the continuing development of facilities-based competition. The Commission should stay that requirement, and thus preserve the status quo, under which CLECs that are competing successfully using special access will continue to do so, for the brief period necessary to obtain review of the Commission’s decision. Preserving the existing state of the market for that period will cause no cognizable injury to

¹ Order on Remand, *Unbundled Access to Network Elements; Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, FCC 04-290 (rel. Feb. 4, 2005) (“*Order on Remand*”).

CLECs, and it will avoid immediate and irreparable harm to petitioners and to the public interest. In sum, although the harms caused by the Commission's UNE requirements for high-capacity facilities imposed in the absence of a proper impairment analysis even more than eight years after the passage of the 1996 Act are not readily susceptible to relief through a stay, the Commission can at least avoid making the status quo materially worse by staying the conversions rule.

Because of the severe harm that will be caused by these rules if they are permitted to take effect, and to allow sufficient time for the reviewing court to address a stay motion in the event that the Commission does not grant relief, petitioners respectfully request action on this petition by March 4, 2005. If the Commission fails to resolve this petition by that date, petitioners will be constrained to seek relief in the court of appeals pursuant to Rule 18 of the Federal Rules of Appellate Procedure.

DISCUSSION

The challenged aspect of the *Order on Remand* should be stayed if petitioners demonstrate either (1) a likelihood of success on the merits together with a showing of "irreparable injury," or (2) a "serious" question regarding the merits coupled with a "substantial" showing that the balance of equities tips in petitioners' favor. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). This petition meets both alternative standards: petitioners are likely to succeed on the merits, and the equities overwhelmingly favor a stay.

I. THE COMMISSION'S DECISION TO AUTHORIZE CONVERSIONS FLOUTS THE FEDERAL COURTS' INSTRUCTIONS

The Commission's *Order on Remand* expressly authorizes CLECs to convert to UNEs, and thus to TELRIC pricing, the special access facilities that they are currently using to serve

customer locations. *See Order on Remand* ¶ 229 (concluding that a “bar on conversions would be inappropriate”). That Commission decision is directly contrary to the requirements of the 1996 Act and the instructions of the Supreme Court and the D.C. Circuit, and it is likely to be overturned on review.

The Commission grounded its decision to permit conversions in a fundamentally mistaken understanding of the legal context. The Commission apparently believed that the D.C. Circuit had previously “upheld” its decision to permit this practice. *Id.*

That is wrong. In *USTA II*,² the D.C. Circuit reviewed the ILECs’ “independent attack on the Commission’s decision to allow ‘conversions’ of wholesale special access purchases to UNEs.” 359 F.3d at 593. Far from rejecting the ILECs’ concerns, as the *Order on Remand* suggests, the court made clear that it found persuasive the argument that parties that are already competing successfully with special access should not be able to convert the same facilities to UNE pricing. It stressed that “the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access . . . *precludes* a finding that the CLECs are ‘impaired’ by lack of access to the element” as a UNE. *Id.* (emphasis added). The court recognized that this holding “might create anomalies” if similarly situated CLECs were not likewise barred from access to UNEs. *Id.* But it also pointed to the obvious answer: “if history showed that lack of access to EELs had not impaired CLECs in the past, that would be evidence that similarly situated firms would be equally unimpaired going forward.” *Id.* Because a remand was required in any event, the court chose to leave it to the Commission in the first instance to “consider and resolve any potential anomaly on remand.” *Id.*

² *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.) (“*USTA II*”), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

The court's limited remand thus left room for the Commission to address this "potential anomaly," but it did not empower the Commission to disregard the court's threshold determination that CLECs currently using special access to compete are not "impaired" and therefore may not lawfully convert their special access circuits to UNE pricing. By ruling that CLECs may nevertheless do just that, the Commission violated the court's mandate. Because an agency on remand may not "do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case," *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977) (internal quotation marks and brackets omitted), petitioners plainly have a substantial likelihood of success on appeal.

Even beyond that, permitting CLECs that are already competing successfully at specific locations using special access circuits to convert to UNE pricing is indefensible. Under section 251(d)(2), the relevant question is not whether CLECs are maximizing their potential profits without UNEs, but instead whether they are "impair[ed]" in their "ability . . . to provide the services that [they] seek[] to offer." 47 U.S.C. § 251(d)(2). Accordingly, the Supreme Court specifically rejected the argument that CLECs that can compete without unbundling should nevertheless be able to use UNEs to obtain "even handsomer" profits. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 n.11 (1999). Likewise, where a CLEC is already competing successfully using special access, the use of tariffed services has necessarily not rendered competition "uneconomic," which, as the D.C. Circuit has held, means that the Commission "cannot justify a finding of impairment." *USTA II*, 359 F.3d at 577.

None of the Commission's rationales for permitting conversions affects this straightforward analysis. Indeed, the Commission hardly offered any independent justification for this rule. Instead, it relied on the theory that prohibiting conversions would be inconsistent

with its more general conclusion in the *Order on Remand* that “a carrier’s current use of special access does not demonstrate a lack of impairment.” *Order on Remand* ¶ 229; *accord id.* ¶ 231. The Commission’s justifications for failing to consider special access in its impairment analysis are unlawful and unpersuasive even in their own context. When pressed into service to justify allowing a CLEC that is already competing successfully to obtain the artificial advantages of TELRIC rates, they are even more misguided.

First, the Commission has suggested that it would frustrate the goals of the 1996 Act to allow ILECs to “offer services on a tariffed basis at prices just low enough to permit competition” but higher than TELRIC rates. *Id.* ¶ 51. But the Supreme Court squarely rejected that precise analysis in *Iowa Utilities Board*. The Court stressed that the purpose of unbundling is to permit CLECs to compete where they could not otherwise do so, *not* to allow parties already competing without UNEs to obtain a heftier profit. *See* 525 U.S. at 390 & n.11. The D.C. Circuit likewise explained in *USTA II* that competition using special access is not “as horrifying as the Commission seems to think,” because the “purpose of the Act is not . . . to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate.” 359 F.3d at 576.

Second, the Commission has suggested that the structure of the 1996 Act indicates that Congress did not permit consideration of special access in determining whether UNEs should be made available. *See Order on Remand* ¶ 51. Again, precedent is directly to the contrary. *USTA II* holds that there is no conflict between Congress’s decision to establish a UNE requirement and this Commission’s obligation to consider the availability of special access in determining where to require unbundling. The D.C. Circuit rejected the notion that considering tariffed services would “effectively read unbundled access out of the Act” because nothing in the statute suggests

that the availability of facilities through other statutory mechanisms is “irrelevant to whether there is impairment of the sort that would require unbundling” under section 251(d)(2). 359 F.3d at 576-77. That holding is binding here.

Third, the Commission justified its conversions rule (and its decision to ignore special access generally) by noting that they apply only in the supposedly distinct local market, and not when competitors seek to provide long-distance or wireless service exclusively. *See Order on Remand* ¶¶ 64, 230. Once a carrier obtains a circuit, however, it can be used for any kind of traffic. There is thus no separate “local services market” for the high-capacity facilities at issue here; customers can and do use these facilities to obtain a mix of local, long-distance, and data services.³ In any event, the Commission has conducted no analysis of the market for high-capacity circuits that could possibly justify its disregard of special access. Had it done so, it would have been forced to confront the fact that competitors already control the majority of high-capacity services provided to enterprise customers — including more than *three-quarters* of the services these customers demand most — and that, where they compete using incumbent facilities, they do so predominantly through special access, not UNEs.⁴

Fourth, the Commission has suggested that prohibiting conversions would raise administrability concerns. In particular, the Commission noted the potential “anomal[y]” that, if it prohibited only the specific CLEC currently using special access from converting to UNEs,

³ *See* UNE Fact Report 2004 at III-34 (attached to Letter from Evan T. Leo, Kellogg, Huber, Hansen, Todd & Evans, PLLC, to Marlene H. Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338 (Oct. 4, 2004)); Comments of Verizon at 67, WC Docket No. 04-313 & CC Docket No. 01-338 (FCC filed Oct. 4, 2004) (“Verizon Comments”); Bruno Decl. ¶ 8 (Attach. D to Verizon Comments).

⁴ *See, e.g.*, Ex Parte Letter from Evan T. Leo, Kellogg, Huber, Hansen, Todd & Evans, PLLC, to Marlene H. Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338, at 4 (Dec. 13, 2004) (“12/13/04 Ex Parte”).

some carriers might be able to obtain UNEs while other competing carriers might not. *See Order on Remand* ¶ 231. But there would be no such issue if the Commission had concluded, as the D.C. Circuit pointedly suggested, that the ability of one CLEC to compete successfully using special access to serve a customer location demonstrates that other, reasonably efficient competitors could do so as well.

The Commission apparently rejected that conclusion on the basis that it is “unjustifiabl[e] [to] assume that a competitor currently using special access services has voluntarily chosen to forgo UNEs.” *Id.* ¶ 231 n.646. Again, however, that claim simply highlights how far the Commission departed from a lawful impairment inquiry.⁵ It is entirely irrelevant whether a CLEC *voluntarily* competes without UNEs. Instead, the question is whether “competition is *possible*” without UNEs — that is, whether a network element is “*unsuitable* for competitive supply.” *USTA II*, 359 F.3d at 575 (emphasis added); *USTA I*,⁶ 290 F.3d at 427 (emphasis added). The fact that competing carriers are able to serve customers successfully using special access thus demonstrates that they do not *need* access to UNEs, regardless of whether they *prefer* to obtain those same circuits at a lower price.

Finally, the Commission has claimed with respect to special access generally and conversions in particular that consideration of special access “would court the risk of incumbent abuse.” *Order on Remand* ¶ 65; *accord id.* ¶ 231. Specifically, the Commission asserted that the “freedom associated with the [Commission’s] pricing flexibility regime” for special access

⁵ It is also factually wrong. The record shows that many CLECs retained special access circuits long after they could have converted them to UNEs. *See* Verizon Comments at 77; Verses/Lataille/Jordan/Reney Decl. ¶ 59 (Attach. B to Verizon Comments).

⁶ *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA I*”), *cert. denied*, 538 U.S. 940 (2003).

would give incumbents “substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a ‘price squeeze.’” *Id.* ¶ 59. In adopting that “pricing flexibility regime,” however, the Commission itself held that its rules “ensur[e] that . . . [incumbents] do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior,” by “mak[ing] exclusionary pricing behavior costly and highly unlikely to succeed.” *Pricing Flexibility Order*⁷ ¶¶ 3, 80. The D.C. Circuit affirmed that determination, quoting the Commission’s discussion about the difficulties of engaging in price squeezes. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001).

In any event, even if there were a genuine threat that ILECs would raise special access prices, the Commission can and must address that issue directly. The D.C. Circuit held in *USTA II* that the Commission is prohibited from mandating unbundling where it can address an alleged source of impairment directly or through a “narrower alternative” with “fewer disadvantages” than UNEs. 359 F.3d at 570-71. As the Commission itself has explained, *USTA II* establishes that “neither the impairment inquiry nor the other aspects of the unbundling framework should be distorted to compensate for alleged failings in related but distinct areas of the Commission’s regulatory regime.” *Order on Remand* ¶ 23. In this context, that means addressing any concerns about special access price increases directly, rather than imposing the sledgehammer solution of unbundling. And the Commission’s failure to pursue that tailored remedy is particularly

⁷ Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd 14221 (1999) (“*Pricing Flexibility Order*”), *aff’d*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

inexcusable here, where it has just issued a notice of proposed rulemaking inquiring into special access pricing.⁸

In sum, none of the Commission's assertions justifies its defiance of the Supreme Court's and the D.C. Circuit's holdings. Petitioners thus have a very substantial likelihood of success on judicial review of this Commission's determination.

II. THE BALANCE OF EQUITIES FAVORS A STAY

The Commission's decision in the *Order on Remand* to permit the conversion of special access facilities to UNEs threatens petitioners with substantial and irreparable injury. On the other hand, preserving the current state of the market, in which CLECs are *already* competing successfully using the very special access circuits that the *Order on Remand* would allow them to convert and can continue to do so, causes no cognizable harm to other parties and furthers the public interest in creating incentives for facilities-based competition. The balance of equities thus favors a stay.

As a direct result of the Commission's decision, petitioners will lose tens millions of dollars in special access revenues in the time it will take to obtain an appellate reversal even under an expedited schedule, which they will not be able to recoup in full even if a court or the Commission were ultimately to require the payment of special access rates back to the effective date of the Commission's order. *See* Declaration of Ronald H. Lataille ¶¶ 10-12 ("Lataille Decl.") (attached hereto as Ex. A). In particular, while many CLECs are successfully competing using Verizon special access services (*see* notes 12 & 13, *infra*), given past experience and the dynamic and competitive nature of the communications industry, it is to be expected that some

⁸ Order and Notice of Proposed Rulemaking, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, FCC 05-18 (rel. Jan 31, 2005).

CLECs that seek conversions will declare bankruptcy and/or dissolve before petitioners can recoup any losses. *See* Lataille Decl. ¶ 12. Such unrecoverable losses constitute irreparable injury. *See American Hosp. Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 594, 596 (7th Cir. 1986) (risk that complete recovery will not be possible creates irreparable injury); *Seide v. Crest Color, Inc.*, 835 F. Supp. 732, 735 (S.D.N.Y. 1993) (preliminary relief may be available if there is a risk that a judgment would be effectively uncollectible); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (in the absence of “adequate compensatory or other corrective relief,” “economic loss” amounts to irreparable harm) (citation and internal quotation marks omitted).

In the absence of a stay, moreover, petitioners will incur network costs that they will never recoup. In particular, in order to take advantage of TELRIC rates, CLECs will adjust their networks to satisfy the Commission’s EELs eligibility criteria for the maximum number of circuits. *See* Lataille Decl. ¶ 13. These “grooming” changes impose significant costs on petitioners, and a subsequent appellate reversal will not help petitioners recover those costs to the extent that they are otherwise uncompensated. *See id.* Petitioners will likewise incur substantial and unrecoverable administrative expenses to undertake conversions that, if the Commission’s order is reversed, they will never regain. *See id.* ¶ 14. These too constitute irreparable injury. *See National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979) (irreparable harm found because plaintiff would incur substantial unrecoverable expenses to comply with regulations that may be invalid).

Additionally, allowing the conversions rule to take effect will lead to significant disputes before state commissions in instances where CLECs seek to litigate the interconnection agreement terms necessary to implement the Commission’s eligibility criteria. *See* Lataille Decl.

¶¶ 7-9. That litigation would be wholly unnecessary if the Commission's conversions rule is overturned on appeal, just as the state proceedings created by the *Triennial Review Order*⁹ became unnecessary after *USTA II*. A stay would thus avoid a significant and unnecessary diversion of public and private resources. And, of course, once those resources are expended, this Commission is powerless to undo the harm its decision has caused.

Nor would a stay impose any cognizable harm on CLECs that could offset the significant losses that petitioners will suffer. CLECs will be able to compete successfully in the market, just as they are doing today. They will continue to be able to use the same special access circuits that they have already used to win customers, so there will be no harm to their competitive position. And there can be no serious doubt that current use of special access enables CLECs to compete successfully today. More than 110 CLECs (*excluding* AT&T, MCI, Sprint, and wireless carriers) purchase 100% of their DS-1 or DS-3 circuits from Bell operating companies ("BOCs") as tariffed special access, not UNEs.¹⁰ Overall, 79% of the DS-1 circuits and 95% of the DS-3 circuits that CLECs other than wireless carriers obtain from BOCs are purchased as special access.¹¹ Thus, Time Warner Telecom, for instance, has stated that it "does not rely upon UNEs," because it earns the "majority of our revenue . . . exclusively through our own network facilities," and, in those "instances where we need services from ILECs to connect our remote customers to our vast fiber network, we purchase those under special access tariffs or

⁹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

¹⁰ See 12/13/04 Ex Parte at 2.

¹¹ See *id.*, Attach. 1 at 7, Attach. 2 at 4.

under agreements with the ILECs.”¹² Perhaps most importantly, carriers that rely predominantly or exclusively on special access have positive Earnings Before Interest, Taxes, Depreciation & Amortization (“EBITDA”), a standard measure of financial success.¹³

Finally, the public interest strongly favors a stay. The goal of the 1996 Act is to “stimulate competition — preferably genuine, facilities-based competition.” *USTA II*, 359 F.3d at 576; *see Order on Remand* ¶ 218 (“[T]he Commission [has] expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute.”) (footnote omitted).

Contrary to the Commission’s prior analysis, it is reliance on UNEs at TELRIC rates, not the use of special access, that “frustrates” the “promotion of facilities-based competition.” *Id.* ¶ 52. As the Commission recognized elsewhere in the *Order on Remand*,¹⁴ “low UNE prices” create the “disincentive to invest” in facilities-based competition, by making it irrational to deploy otherwise economic facilities. *USTA I*, 290 F.3d at 424 n.2, 427. By contrast, in the absence of UNEs, if CLECs are more efficient and can provide service at lower cost than special access rates using their own facilities, they will have every incentive to do so.

¹² Time Warner Telecom Press Release, *Time Warner Telecom Not Impacted by UNE Ruling* (June 10, 2004) (quoting Paul Jones, SVP, General Counsel and Regulatory Policy). US LEC stated that it is “successfully executing its business plan and, importantly, . . . [is] well positioned to address the uncertainty around UNE services,” because “over 90% of [its] customer T-1s are not UNE based.” US LEC Press Release, *US LEC Achieves \$91.6 Million in Revenue and \$12.9 Million of EBITDA* (July 29, 2004). Pac-West stated that it “does not employ UNEs in its current network architecture in any significant way.” Pac-West Telecomm Press Release, *Pac-West Telecomm Anticipates No Direct Impact From FCC Triennial Review Actions* (June 10, 2004).

¹³ *See, e.g.*, Reply Comments of Verizon at 86-87, WC Docket No. 04-313 & CC Docket No. 01-338 (FCC filed Oct. 19, 2004).

¹⁴ *Order on Remand* ¶ 218 (“It is now clear . . . that . . . UNE-P has been a disincentive to competitive LECs’ infrastructure investment.”).

If the Commission is not willing to stay the parts of its *Order on Remand* authorizing conversions, it should, at the very least, require CLECs that do obtain conversions to escrow the difference between the UNE rate they are paying and the special access rate that would otherwise apply pending a decision by a reviewing court. Such an escrow arrangement would provide petitioners with the security that they will recoup at least a significant part of their losses if they prevail in court without harming any legitimate CLEC interest.

CONCLUSION

The Commission should stay the *Order on Remand* to the extent it permits CLECs that are currently using special access circuits to convert those circuits to UNEs.

Respectfully submitted,

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